BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RICHARD K. KEPLER	)	
Claimant	)	
VS.	)	
	)	Docket No. 245,211
NEW YORK AIR BRAKE	)	
Respondent	)	
AND	)	
	)	
UTICA NATIONAL INSURANCE GROUP	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier appeal from a preliminary hearing Order entered by Administrative Law Judge Steven J. Howard dated August 4, 1999.

ISSUES

The Administrative Law Judge granted claimant's request for temporary total disability compensation and medical benefits. Respondent seeks review of the ALJ's findings that claimant proved he sustained personal injury by accident arising out of and in the course of his employment with respondent, gave timely notice of accident, and that the Kansas Workers Compensation Act applies to this claim.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the record presented to date, the Appeals Board finds and concludes the ALJ's Order should be affirmed.

K.S.A. 1999 Supp. 44-534a(a)(2) gives the Appeals Board jurisdiction to review the issues raised by respondent.

Claimant alleges he was injured while working for respondent in Missouri. Claimant does not allege that his principal place of employment was in Kansas. Accordingly, for the Kansas Workers Compensation Act to apply to this claim, the contract of employment between claimant and respondent must be determined to have been made in Kansas. See K.S.A. 44-506.

An employment contract is made in Kansas where the last act necessary for its formation is done in Kansas. See Smith v. McBride & Dehmer Construction Co., 216 Kan. 76, 79, 530 P.2d 1222 (1975). Claimant testified that he accepted employment with the respondent during a telephone conversation with Mark Rife the manager of respondent's

Riverside, Missouri, plant. Claimant lives in Kansas City, Kansas, and was at his home in Kansas when the telephone conversation took place. On the other hand, Mr. Rife testified that after claimant passed his pre-employment physical he made claimant a conditional offer of employment and claimant's acceptance occurred when claimant reported for work at the respondent's business location in Missouri.

If it is found that an employer has made an offer of employment during a telephone conversation and such offer was accepted by the claimant, the rule in this jurisdiction is that the contract of employment is made in the state where the claimant is located. See Neumer v. Yellow Freight System, Inc., 220 Kan. 607, 556 P.2d 202 (1976); Morrison v. Hurst Drilling Co., 212 Kan. 706, 512 P.2d 438 (1973); Hartigan v. Babcock & Wilcox Co., 191 Kan. 331, 380 P.2d 383 (1963); Pearson v. Electric Service Co., 166 Kan. 300, 201 P.2d 643 (1949). The ALJ must have found that the contract of employment between the parties was made in Kansas because he granted claimant's request for preliminary workers compensation benefits. Thus, the ALJ found the Kansas Workers Compensation Act applies to this claim.

The evidentiary record establishes, and the ALJ apparently found, that claimant is credible. The Appeals Board finds that claimant accepted an offer of employment in Kansas during his second telephone conference with Mark Rife. This second call came from Mr. Rife after claimant sent in his application for employment and after his in-person interview. But even if it were determined that claimant was not hired until after he passed his "pre-employment" physical, he certainly was in the next telephone call. Mr. Rife testified:

> Q. After the physical what happened?
> A. Then after we had the results of the physical, we tell them that the physical was fine and they can report to work on -- I believe at that time it was January 11th, if I'm correct, and went to work on Monday.[1]

Accordingly, the Appeals Board finds that the Kansas Workers Compensation Act does apply to this claim.

We next address the issues of injury by accident arising out of and in the course of employment and notice. Claimant alleges a series of repetitive traumas commencing February 1, 1999 through June 2, 1999, claimant's last day at work. Claimant was required to wear steel-toed work shoes. Large blisters developed on each of his big toes from wearing those shoes. He notified Mr. Rife and requested that he be given metal shoe covers instead of wearing the steel-toed boots because they were causing blisters. Mr. Rife granted this request and, in about three days, claimant was given the metal shoe covers. Claimant's left foot blister healed but the blister on the right never did. Claimant contacted his personal physician, Dr. Charles W. Ragland, who referred claimant to a podiatrist, Dr. Donald A. Gentry. The toe failed to respond to treatment and eventually had to be amputated. The amputation was performed by orthopedic surgeon Frederic M. Gilhousen, M.D., on June 7, 1999.

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[1] Transcript of Proceedings of 8/3/99 at 31.

Claimant testified that he did not wear the steel-toed boots anywhere but at work. He also denied having purchased any other new shoes during that time or performed other activities which would have caused the blisters. The histories in the medical records are consistent with claimant's descriptions of the cause of his blisters. The history of present illness contained in the June 9, 1999 Bethany Medical Center discharge summary by Dr. Ragland states:

> "The patient was required to wear metal boots at his work. Because he is a diabetic the blister, unfortunately, led to some osteomyelitis which, in turn, led to gangrene. He was admitted. We tried to save the toe, but were unable to."[2]

The Appeals Board finds claimant's condition arose out of and in the course of his employment with respondent.

As to notice, claimant testified "I notified Mr. Rife and requested that I get these steel -- or metal shoe covers instead of wearing the steel-toed boots because they were causing blisters."[3] Mr. Rife was present when claimant gave this testimony and Mr. Rife testified immediately after claimant. He said nothing to dispute claimant's testimony that claimant notified him of the blisters and that they occurred from wearing the required work boots. The Appeals Board finds claimant's uncontradicted testimony proves he gave the notice required by K.S.A. 44-520.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order of Administrative Law Judge Steven J. Howard, dated August 4, 1999, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of December 1999.

BOARD MEMBER

c: James E. Martin, Overland Park, KS
Frederick L. Haag, Wichita, KS
Steven J. Howard, Administrative Law Judge
Philip S. Harness, Director

[2] Claimant's Exh. 1 to Transcript of Proceedings of 8/3/99.

[3] Transcript of Proceedings of 8/3/99 at 12.